FUNAI ELECTRIC (M) SDN BHD

v.

SALIAH AHMAD

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION NO: R1-25-121-97]
28 FEBRUARY 2000

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for - Whether Industrial Court erred in coming to decision that employee was constructively dismissed*

LABOUR LAW: *Employment - Dismissal - Constructive dismissal - Test for - Whether Industrial Court correctly applied test - Contract test - Unreasonable test*

LABOUR LAW: *Employment - Contract of service - Terms and conditions - Transfer - Whether employee needs to be consulted before being transferred - Whether such matters entirely within company's prerogative*

The claimant was the assistant manager in the shipping department. She was transferred to the service parts department as its manager. She wrote to the management stating her displeasure about the matter. When the management did not reply, she left the company citing that she had been constructively dismissed.

The claimant contended that her transfer was in effect a demotion as her job scope and functions were reduced, less staff reported to her and that her work station had been moved from the main office to the store area. She submitted that the company should have consulted her before enforcing the transfer.

The Industrial Court decided that the claimant was constructively dismissed. It further found that the claimant had been victimised and that the company had unilaterally varied her contract of employment through the transfer.

In its present application for *certiorari*, the company argued that the Industrial Court was wrong in law. It was submitted that the chairman had erred in using the unreasonableness test as opposed to the contract test, which should have been applied in deciding whether there were valid grounds in the claimant's averment. The company also submitted that the chairman had taken into account irrelevant matters and omitted to consider relevant facts.

Held:

[1] The proper test to be applied in constructive dismissal cases is the contract test. Thus, the duty of the presiding tribunal is to ascertain whether the employer has been guilty of such conduct that tantamounts to a fundamental breach of contract. The question of the reasonableness of the employer's actions does not arise in such circumstances.

[2] The company had the prerogative right to transfer the claimant. This was reflected in the claimant's letter of appointment and the subsequent letters of promotion. Even the claimant had, during cross-examination, conceded this. Therefore, the need for the company to consult her before effecting the transfer became superfluous.

[2a] The Industrial Court was wrong in deciding that the company should have consulted the claimant before transferring her. The tribunal had meant that the transfer was unreasonable. The test of unreasonableness, however, would not apply here.

[3] On the issue of demotion, the claimant's evidence indicated that she was actually questioning the reasonableness of the transfer, and not the transfer itself.

[3a] The Industrial Court had wrongly found that the claimant's submission on demotion was uncontroverted as the company's head of personnel department had tendered a document (which the tribunal rejected) which contained a list of the functions of a service parts manager. This piece of evidence showed that the claimant was essentially in the same status as before the transfer.

[4] The issue of victimisation could not be substantiated as it was not pleaded and there was no evidence to support such a conclusion.

[5] There were no specific findings by the tribunal in relation to the issues of less staff reporting to the claimant and her office being relocated elsewhere, to support the claimant's contention of being demoted.

[6] There were no grounds to justify a finding that the company had unilaterally varied the claimant's service contract. The claimant could not be said to have been constructively dismissed but had, in the circumstances, abandoned her job.

[Application for certiorari granted.]

Case(s) referred to:
Ang Beng Teik v. Pan Global Bhd, Penang [1996] 4 CLJ 313 ***(refd)***
Anwar Abdul Rahim v. Bayer [1998] 2 CLJ 197 ***(foll)***
Funai Electric (Malaysia) Sdn Bhd v. Saliah Ahmad [1997] 2 ILR 1002 ***(refd)***
Mak Weng Kit v. Reed Exhibitions Sdn Bhd (Reed Exhibitions Companies) [2000] 5 CLJ 253 ***(refd)***
Western Excavation (ECC) Ltd v. Sharp [1978] 2 WLR 344 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 452 ***(foll)***

For the applicant - Suganthi Singam; M/s Shearn Delamore & Co
For the respondent - Anand Ponnudurai; M/s Sri Ram & Co

Reported by Bhawani Mano

JUDGMENT

KC Vohrah J:

This is an application for an order of *certiorari* to quash Industrial Court *Funai Electric (Malaysia) Sdn Bhd v. Saliah Ahmad* [1997] 2 ILR 1002. In the award the Industrial Court made a finding that the claimant (the respondent in the present application) had been constructively dismissed and that her dismissal by the company (the applicant before me) was without just cause and excuse.

The chairman of the Industrial Court had concluded that the company was guilty of a fundamental breach of the claimant's contract of employment.

In the application before me the company argues that although the chairman had stated that the company was guilty of a fundamental breach of the claimant's contract in reality the chairman did not apply the test of "fundamental breach" of contract to the case where the claimant had been transferred to a new posting, but had instead throughout, gone on an enquiry whether the transfer was unreasonable and then coming to the finding that the company's conduct was unreasonable. The company contends that this application of the "unreasonableness test" was clearly wrong; the chairman had acted in excess of jurisdiction, committing an error of law.

The claimant was employed by the company in July 1989 as a shipping assistant and she eventually became assistant manager in the Shipping Department.

On 25 March 1996 the company issued a letter to the claimant transferring her to the Service Parts Department as its assistant manager.

Although her pay and other terms of employment remained the same the claimant considered the transfer a demotion as the transfer, she alleged, involved a reduction in duties and job functions. She wrote a letter dated 29 March 1996 protesting the transfer in these terms:

Ref: SA/0078
Dated: 29th March 1996

Attn: MR. MAKI
FUNAI (S'PORE)

To
MR. HIROO MAKI
MANAGING DIRECTOR
FUNAI ELECTRIC (MALAYSIA) SDN. BHD.

Dear Sir,

RE: MY TRANSFER TO SERVICE PARTS DEPARTMENT.

I refer to your letter dated 25th March 1996 wherein you have transferred me to the SERVICE PARTS DEPARTMENT as SERVICE PARTS ASSISTANT MANAGER.

Kindly be informed that I am totally unhappy with this transfer and consider it as *de facto* demotion in rank and job scope. This is especially in view of the fact that I have been in the SHIPPING DEPARTMENT for almost seven years and rose from the rank of SHIPPING ASSISTANT to ASSISTANT MANAGER, and have served under three SHIPPING MANAGERS.

Throughout the seven years, I have handled many problems in the Department, very often on my own. Therefore, I do not feel it is just on the part of the management to take me away from the Department to a job of low opportunity.

Furthermore having been in FUNAI for seven years it is clear to me that this move is actually a "COLD STORAGE". I have seen it happen before.

It is my hope that you will use your good office to settle the matter as soon as possible.

Regards.

Signed:
SALIAH AHMAD
(ASSISTANT MANAGER)

c.c.; PERSONNEL MANAGER
c.c.: SHIPPING MANAGER.

There was no response to this letter and the claimant concluded herself as being constructively dismissed from 12 April 1996.

The claimant in her evidence maintained that the transfer was a demotion as it involved a reduction in her duties and job functions; in less people reporting to her; in her office being moved from the main office to the store area. And also in evidence she brought up the matter of not being consulted before the transfer nor of being informed of it before she received the letter of transfer.

In her award the chairman of the Industrial Court correctly referred to the Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45 which adopted the concept of constructive dismissal that was explained by Lord Denning MR in *Western Excavation (E.C.C.) Ltd v. Sharp* [1978] 2 WLR 344:

> If the employer is guilty of conduct which is a significant breach going to root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates his contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious for him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

It was thought at one time that the Court of Appeal case of *Ang Beng Teik v. Pan Global Textile Bhd, Penang* [1996] 4 CLJ 313; [1996] 3 MLJ might have made inroads into the concept of constructive dismissal as was enunciated in the case of *Wong Chee Hong* but both counsel before me say they are not relying on *Ang Beng Teik* and in any event in a later Court of Appeal case, *Anwar Abdul Rahim v. Bayer* [1998] 2 CLJ 197; [1998] 2 MLJ 599, the Court of Appeal firmly held that the proper approach in deciding whether constructive dismissal has taken place is not to ask whether the employer's conduct was unreasonable but to see if the employer was guilty of conduct which is a significant breach going to the root of the contract of employment. *Anwar's* case has been recently upheld by the Federal Court and it can be taken the contract test propounded by the Supreme Court in *Wong Chee Hong* still stands.

I had occasion to comment on *Wong Chee Hong* and *Ang Beng Teik* in *Mak Weng Kit v. Reed Exhibitions Sdn Bhd (Reed Exhibitions Companies)* [2000] 5 CLJ Supp 253, and had come to the conclusion that the case of *Wong Chee Hong* is a binding precedent.

Counsel for the claimant throughout has argued that the proper test to be applied was the contract test and in this case the Industrial Court had correctly applied the contract test.

Before I go further, let me observe that when the claimant was employed by the company her letter of appointment from the company dated 21 July 1989 had this term:

> The Company has the right to transfer you to any department without notice or assigning any reasons.

The claimant did not dispute that the company was acting within the terms of transfer; she answered "Yes" when asked under cross-examination – "The Company was acting within the terms of 'transfer'?"

There was a prerogative right of the company to transfer the claimant, the test to be applied is the contract test and no issue of the need to consult before the transfer was pleaded, yet this is what the Industrial Court stated:

> As stated above the right to transfer an employee is the prerogative of the company and it does not require the consent of the employee in the exercise of such prerogative. What can reasonably be expected however is that there should be some genuine consultation between the two parties wherein their sometimes conflicting interests may be resolved or otherwise the adverse effects of a transfer upon an employee may be minimised. That the Claimant was not happy with the said transfer is evident from her letter of protest dated 29th March 1996. However the Company for whatever reason known to itself did not see it fit to reply to the said letter nor did it call the Claimant for consultation about its decision to transfer her. It appears that the Company's manner of exercising its prerogative might be questioned as being an unfair labour practice.

I agree with the counsel for the company that it was wrong for the Industrial Court to decide that the company should have consulted the claimant before transferring her and to conclude:

> It appears the Company's manner of exercising its prerogative might be questioned as being an unfair labour practice.

What the Industrial Court meant was that the transfer was unreasonable. The Industrial Court having recognised that the company had the prerogative of transfer – in fact it was a term of her appointment and she

had agreed that the company was acting within the terms of "transfer" – the Industrial Court was wrong in using the test of "unreasonableness" on the transfer when the test should be in accordance with the Supreme Court case of *Wong Chee Hong* whether the company was guilty of a breach which went to the root of the contract or if the company evinced an intention no longer to be bound by it, the "contract test".

Notwithstanding that the company had throughout maintained that the company had a prerogative right to transfer the claimant – and there was the clear term in the letter of appointment of and the subsequent letters of promotion that she was subject to transfer without any notice or assignment of reason on the part of the company – and the Industrial Court being cognisant of this, the Industrial Court was completely out of step when throughout the award what was harped on was the recurring theme that there was a so-called unfair labour practice as the company had failed to consult the claimant before the transfer.

What was clearly wrong was for the Industrial Court in not only tying the non-consultation before transfer finding to the only pleaded reason by the claimant that the transfer was a fundamental breach of her employment contract – that the purported transfer was a demotion as it involved a reduction in duties and job functions and the moving of her office from the main office – but treating it as unfair labour practice and making it the dominant reason for considering it as a demotion.

There was reference not only to unfair labour practice but also to victimisation. The court stated:

> Moreover the failure to treat her with respect that is due to a workman, more so considering her long and unblemished record of service is an affront to the pride and dignity of the Claimant and an iniquitous form of victimisation and unfair labour practice.

As I had stated earlier unfair labour practice was not in issue. And "victimisation" was not pleaded and there was no evidence to support the findings.

The dominant theme of the so-called unfair labour practice was referred to by the Industrial Court thus:

> The Company has failed to inform and discuss the matter with the Claimant before issuing the letter of transfer and hear her problems as a matter of good employer-employee relations. Furthermore the Claimant's evidence that there was an erosion of her duties and responsibilities is uncontroverted. COWl having never been posted to the Service Parts Department cannot testify as to the actual duties of its assistant manager. Moreover the fact that the post has

> been left vacant for a year would suggest that it was not a vital post. Accordingly the Court finds that the transfer of the Claimant amounts to a unilateral variation of her contract ... .

The above passage is relevant when considering the claimant's pleaded grounds for stating that the transfer was a demotion – that it involved a reduction in duties and job functions.

In her evidence the claimant had stated that she had expected to be transferred to a more challenging job of the same level, not in reduction of the job scope (ie, the job functions) and in lowering the supervisory levels which can be deemed to be a demotion (ie, in the number of people reporting to her). It can be seen here that the claimant was not disputing the transfer but the **unreasonableness** of the transfer.

There was important evidence taken from the records of the company tendered by COW1 the Head of the Personnel Department which the court ignored. From the records COW1 had stated:

> The job of Service Parts Assistant Manager is not of lower status. According to salary scale – Assistant Manager falls under A4. All Assistant Managers are on the same level ... and apart from salary structure – the job functions are the same.

The records were tendered by the company and accepted by the court and the contents of the documents were not disputed and it was wrong to reject the documents which had been brought in as exhibits in the court. It was in evidence – the claimant had herself admitted – that the list of job functions of a Service Parts Assistant Manager was complete except for the job of dealing with the Customs and Johor Bahru Port. How then could the Industrial Court, in the light of COW1's evidence and the claimant's admission, hold that the claimant's evidence that there was an erosion of her duties and responsibilities was uncontroverted? The Industrial Court's finding was clearly wrong and wrong in law.

What more remained then of her grounds? She pleaded that her office was moved from the main office to the store. She tried to bring under the ground of erosion of her duties and responsibilities the situation where prior to her job 10 staff reported to her whereas after the transfer only four reported to her. What was the Industrial Court's findings on these matters? Nothing specific. The thrust of the Industrial Court's decision was that the company had failed to inform and discuss the matter with the claimant before issuing the letter of transfer and hearing her problems as matter of good employer-employee relationship although as pointed out the Industrial Court recognised that the employer had the prerogative of making the

transfer without notice or assigning any reason for it. The Industrial Court merely dealt with the issue of erosion of her duties and responsibilities generally and then concluded that the claimant's evidence that there was an erosion of her duties was uncontroverted and this has been demonstrated to be incorrect in so far as the reduction of job functions is concerned. There was no specific conclusion on the matter of less staff reporting to her and the office being located from the main office to the store area although the court set out what her evidence was and what the company's witness stated.

With respect I cannot agree with the conclusion of the Industrial Court that the transfer of the claimant amounts to a unilateral variation of her contract. The court had allowed an error of law to intrude into her deliberations of the facts and the law. Her finding that the company should have consulted the claimant before transferring her – in effect using the unreasonable test – was clearly wrong in law. The later finding on job functions reduction – not correct at that and leaving the issue of reduction of staff reporting to her and the change of office untouched – specifically were coloured by her earlier unsustainable finding. This resulted in a conclusion – that of constructive dismissal when clearly the claimant had abandoned her job – which cannot be sustained.

I allow the application of the company. *Certiorari* to issue. Costs to the company.